



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Star Detective & Security Agency, Inc. and E.L.A.
Security, Inc., a Joint Venture--Reconsideration

File: B-260948.3

Date: August 21, 1996

Daniel C. Overton for the protester.

Paul A. Gervas, Esq., Department of Energy, for the agency.

Wm. David Hasfurther, Esq., John Van Schaik, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where protester does not show that prior decision denying its protest contained errors of fact or law or present information not previously considered that warrants reversal or modification of the decision.

DECISION

Star Detective & Security Agency, Inc. and E.L.A. Security, Inc., a Joint Venture (Star/E.L.A.) requests that we reconsider our decision, Star Detective & Sec. Agency, Inc. and E.L.A. Sec., Inc., a Joint Venture, B-260948.2, Aug. 28, 1995, 95-2 CPD ¶ 90. In that decision, we denied Star/E.L.A.'s protest of the award of a subcontract to Jenkins Security & Investigations, Inc. by Fermi National Accelerator Laboratory (Fermilab), a prime contractor with the Department of Energy (DOE). The subcontract was for unarmed security guard services under a request for proposals (RFP) issued as a small disadvantaged business (SDB) set-aside. Star/E.L.A. contends that our decision was based upon erroneous facts and law and should be reversed.

We deny the request for reconsideration.

In its protest, Star/E.L.A. argued that Jenkins's non-SDB subcontractor, Dynamic Security, Inc., was going to perform more than 50 percent of the contract work, which Star/E.L.A. argued would have precluded award to Jenkins had Jenkins honestly represented its intentions in its proposal. In response to this allegation, we stated, "under the RFP, in order for an offeror to be considered an SDB, it has to be at least 51 percent unconditionally owned by one or more individuals who are socially and economically disadvantaged and its management and daily business has

to be controlled by one or more such individuals." Concerning whether Jenkins met this standard, we stated that the protester did not argue that Jenkins itself did not qualify as an SDB; rather, the protester alleged that Jenkins was going to allow Dynamic, a non-SDB subcontractor, to perform a significant portion of the work. We also stated that the protester did not point to anything in the RFP or other authority applicable to this contract which prohibited subcontracting by the SDB. Further, while we acknowledged that there was evidence in the record which supported the protester's view that Dynamic would contribute to the performance of the contract, we concluded that Fermilab reasonably found Jenkins eligible for award.

In its reconsideration request, among other contentions, Star/E.L.A. argues that we erroneously concluded in our initial decision that the "RFP does not prohibit subcontracting." Star/E.L.A. notes that our decision stated "[t]he protester does not point to anything in the RFP or other authority applicable to this contract which prohibits subcontracting by the SDB." According to Star/E.L.A., this was erroneous because the solicitation included the following provision:

"Limitations On Subcontracting

1. This clause applies if this subcontract was awarded as a result of a partial or total set aside for small business.
2. By submission of an offer and execution of a subcontract, the Offeror/Subcontractor agrees that in performance of the subcontract in the case of a subcontract for:
 - (a) Services (except construction). At least 50 percent of the cost of subcontract performance incurred for personnel shall be expended for employees of the concern."

According to Star/E.L.A., contrary to our initial decision, this provision "was a strict limitation on subcontracting in the solicitation."

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must show that our prior decision may contain either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a) (1995). The repetition of arguments made during our consideration of the original protest and mere disagreement with our decision do not meet this standard. R.E. Scherrer, Inc.-- Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

There was no error in our decision concerning the limitation on subcontracting clause. Contrary to Star/E.L.A.'s contention, the clause in question does not prohibit subcontracting work under the contract. Rather, it simply states that an SDB awardee agrees that, if it subcontracts part of the work, at least 50 percent of the cost of performance incurred for personnel will be expended for employees of the SDB.¹

Star/E.L.A. argues that the award to Jenkins was inconsistent with another provision of the solicitation which we did not specifically address in our decision. Star/E.L.A. notes that in response to the protest, Jenkins and Dynamic confirmed that the award had to be based upon Dynamic's capabilities when they admitted Jenkins "does not have the resources to perform a job the scope of Fermilab" According to Star/E.L.A., these circumstances indicate that Fermilab's selection of Jenkins was unreasonable and inconsistent with the following solicitation provision:

"No prospective Subcontractor will be regarded as responsible by Fermilab where the pre-award inspection discloses that the prospective Subcontractor proposes to furnish the services under this subcontract through subcontracting the entire or a substantial portion of the Subcontract to another company"

As we stated in our prior decision, the Jenkins proposal contained a cover letter in which Jenkins advised that Dynamic would be a subcontractor to Jenkins for performance of certain key responsibilities, but that Jenkins would not subcontract more than 49 percent of the contract value. Despite this certification, Fermilab had concerns regarding Dynamic's role under the contract and during discussions requested Jenkins to clarify its relationship with Dynamic. Jenkins confirmed that it would subcontract no more than 49 percent of the work to Dynamic and that Dynamic had agreed to provide support to assist in the day-to-day execution of the contract in areas where Jenkins, due to its size and resource limitations, needed support to ensure the highest quality of service. Further, Jenkins's proposal contained an organizational chart which showed that Jenkins controlled contract performance. Fermilab was satisfied that this explanation and information satisfied

¹DOE informs us that while Jenkins's initial performance did not meet the subcontracting requirement, Fermilab requested that Jenkins take corrective action in order to assure compliance. As part of that corrective action, Jenkins represented that it would place all of the security officers and supervisors performing the contract on Jenkins's payroll. Fermilab reports that its review of Jenkins's payroll shows that all personnel are being paid by Jenkins and concludes that the appropriate corrective action has been taken and that Jenkins is in compliance with the contract.

the RFP requirements including the restriction on subcontracting the entire or a substantial portion of the work. We had no basis to conclude that Fermilab's determination that Jenkins met the above solicitation requirement was unreasonable.²

Star/E.L.A. also argues that it requested copies of technical evaluation documents which were not provided to the firm. According to Star/E.L.A., the lack of documentation was a violation of contracting regulations. The initial protest record included evaluation documents to which Star/E.L.A. was not provided access since these documents included source selection sensitive information. Although these evaluation documents might have been available under a protective order, since Star/E.L.A. was not represented by counsel, a protective order was not issued.

Star/E.L.A. states that it argued in its protest that there were ambiguities in the solicitation. We addressed this contention in our original decision. As we stated:

"Star/E.L.A. also contends that the RFP contained deficiencies that required correction before a proper award determination could be made. This contention is untimely. Our Bid Protest Regulations require that protests based upon apparent alleged improprieties in an RFP must be filed prior to the time set for receipt of initial proposals. 4 C.F.R. Sec. 21.2(a)(1). Since Star/E.L.A. did not file a protest on this matter until after contract award, this allegation will not be considered."

²Star/E.L.A. also argues that we erroneously concluded that the protester did not challenge Jenkins's SDB status. Star/E.L.A. notes that our decision stated: "[T]he protester does not argue that Jenkins does not qualify as an SDB; rather, the protester alleges that Jenkins is allowing a non-SDB subcontractor to perform a significant portion of the work." In challenging this statement, Star/E.L.A. notes it argued in its protest that there was cause to challenge Jenkins's SDB status "as it relates to Jenkins's relationship with [Dynamic] for the purposes of this solicitation." Thus, according to Star/E.L.A., we erroneously concluded that the protester did not challenge Jenkins's SDB status. We see no error in our characterization of Star/E.L.A.'s position. Our only point in the quoted language was that Star/E.L.A. never argued that Jenkins itself, as opposed to Jenkins and Dynamic together, was not an SDB. In other words, the focus of the protester's challenge was on the entity that would perform the contract and the way in which the contract was to be performed. Star/E.L.A. did not argue in its protest, and does not argue in its reconsideration request, that the Jenkins firm is not an SDB.

Since we concluded in our original decision that this contention was untimely and Star/E.L.A. has provided no reason to suggest that conclusion was in error, there is no basis for reconsidering this issue.

Finally, Star/E.L.A. argues that it should have received the award because it proposed the lowest price for the contract. There is no merit to this contention; as we explained in our initial decision, Jenkins submitted the lowest-priced proposal. Although Star/E.L.A. argued in its protest that its proposal would have been the lowest priced had the agency conducted meaningful discussion with the firm, we addressed this contention in our initial decision and found it to be without merit. Star/E.L.A. has not challenged our discussion of this issue, and we see no reason to repeat that discussion here.

The request for reconsideration is denied.

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